MOTION FILED
MAR 31 1989

No. 88-1427 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

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March 31, 1989

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25 pp

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MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae.*

This motion is necessitated by the failure of respondent Frank Meagher, upon request, to give consent to the filing of a brief by ASPA. Petitioner In-

ternational Association of Machinists and Aerospace Workers Pension Plan, *et al.* has consented to the filing of the accompanying brief.

ASPA's interest in this case arises from its position as the world's largest association of personnel and human resource professionals, representing nearly 40,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law governing the private retirement system in the United States. ASPA has long advocated pension laws and regulations which adequately protect the rights and just expectations of workers while allowing plan sponsors and administrators to maintain flexibility in the design and operation of their pension programs.

ASPA views with alarm the possible adoption of a judicial theory of a "continuing violation" in the context of employee benefit law. Adoption of a continuing violation theory would endanger the future of employer-sponsored retirement programs, and the benefit security of plan participants, by imposing a never ending threat of liability upon plan sponsors, administrators and fiduciaries. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA therefore seeks leave to file a brief as an *amicus curiae* urging this Court to grant the Petition for Writ of Certiorari in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is made fully aware of the context of decisions such as that in this case, and is alerted to the startling implications of the "continuing violation" theory. ASPA hopes both that such an exposition may be useful to the Court in deciding to review this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the factual merits of the case at bar.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Ninth Circuit, in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action accrues each time an allegedly inadequate periodic benefit check is received, has undermined the intent of Congress by eliminating for all practical purposes a statute of limitations for participant claims under ERISA and thereby threatening the future of employer-sponsored retirement programs and the benefit security of plan participants.

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BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

Interest of the *Amicus Curiae*

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel and human resources professionals, represent-

ing over 40,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law governing the private retirement system in the United States. ASPA has long advocated pension laws and regulations which adequately protect the rights and just expectations of workers while allowing plan sponsors and administrators to maintain flexibility in the design and operation of their pension programs.

ASPA is aware that employer-provided pensions, along with Social Security benefits and individual savings and asset income, comprise for many American families and individuals the "three-legged stool" of retirement income, and ASPA advocates the expansion of the private pension system to alleviate some of the reliance on Social Security. Essential to an expanded reliance upon the pension system is the maintenance of the finely tuned balance between protecting pension benefits for plan participants while limiting the costs to and restrictions upon plan sponsors, administrators, and fiduciaries.

ASPA is concerned that the ruling by the court below will upset the balance Congress has taken care to preserve by providing an overabundance of protection for participants while sacrificing virtually all consideration of the interests of the sponsors, administrators, and fiduciaries. ASPA is particularly con-

cerned that this imbalance of interests will ultimately harm all parties to the private retirement system. ASPA is also concerned that this imbalance will undercut the private pension system's status as a vital component of retirement income, and cause the Social Security system to become the primary source of retirement income for many individuals who otherwise would have been supported primarily by private pensions.

ASPA believes that the present case provides the proper vehicle for this Court to reaffirm the delicate balance drawn by Congress between the legitimate goals of encouraging private pension and welfare plans and protecting the legitimate rights of participants as well as ensuring the effectiveness of the system in providing retirement income security to employees.

Summary of Argument

The decision below raises an issue of great importance. As the Petitioner has expressed in its brief to this Court, the Ninth Circuit's ruling that a separate and independent cause of action accrues each time an allegedly inadequate periodic benefit check is received conflicts with decisions of the First, Fourth, Fifth and District of Columbia Circuits. Congress clearly understood that the operations of employee benefit plans are increasingly interstate, and thus designed the Employee Retirement Income Security Act of 1974 (hereafter "ERISA") to foster a uniformity of decision to assist administrators, fiduciaries and participants to

predict the legality of proposed actions.[1] The Ninth Circuit, by declaring *sua sponte* that a separate and independent cause of action accrues each time an allegedly inadequate periodic pension check is received,[2] conflicts with Congressional intent and its opinion should thus be reviewed by this Court in order to redress the conflicting interpretations of ERISA.

Of additional import to the Court's consideration of whether to issue a Writ of Certiorari is the grave legal and policy consequences which would be created if the decision below were unreviewed. If left undisturbed, the decision below would have the effect of burdening the interests of all those involved in the employee benefit system in order to grant a benefit to participants which the participants do not need. The statutory structure of ERISA and its rigid reporting and disclosure requirements leave no void which an open-ended period to bring legal action against a plan trustee could fill. These statutory requirements insured that the Respondent was at all times fully informed about the amount of his anticipated pension benefits and the basis for their computation. In addition, in comparison to other laws designed to protect employees, ERISA's statute of limitations period, commencing upon receipt of notification of a change in benefits, provides a very liberal amount of time for a participant to commence suit.

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[1] S.Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865.

[2] The Respondent had argued that his limitation period was tolled until he learned that the action taken was illegal. The District Court had rejected this Contention; the Ninth Circuit, however, volunteered its own version of when the cause of action accrued.

Thus, ERISA already provides adequate time for a participant to safeguard his or her right to pension benefits. The Ninth Circuit's expansive interpretation of the period in which to commence suit, therefore, is not needed to ensure that pension benefits are protected.

The decision of the court below is improper as well as unnecessary, for it will cause injury to plan sponsors, administrators, fiduciaries, and even the plan participants themselves. As a practical matter, fiduciaries will be faced with a virtually never-ending liability. Fear of such liability may detrimentally affect their exercise of discretion and may cause reputable fiduciaries either to raise their rates substantially or to get out of the business altogether. Plan sponsors and administrators may be faced with widespread contingent liabilities. These liabilities could lead to underfunding of plans and to plan terminations, two of the very results which ERISA was designed to prevent. Such results may also lead to decisions to cut back on future contributions in order to fund the contingencies, or not to provide new or extended benefits. These outcomes run contrary to Congress' intent to make retirement plans more effective in providing retirement income for employees who have spent their careers in useful, socially productive work. These possibilities are not merely idle speculation or a parade of horrors designed to pique the interest of this Court. The decision below fundamentally attacks the notions of certainty and security which were the foundations of ERISA. Speculations about the ultimate harm visited upon our private pension system is appropriate as well because of the vast sums of

money involved and the potential for never-ending litigation directed toward reaching that money.

In addition, were it to be followed, the lower court's ruling could have a detrimental effect upon the Social Security system. Those who otherwise would have benefited from fully funded, operational, ample private pensions might be forced to rely completely or to a greater extent upon Social Security benefits. Such increased reliance by these millions of Americans would cause the Social Security system to be what Congress never intended it to be—the primary source of retirement income.

In view of the fact that the lower court ruling will harm plan sponsors, administrators, fiduciaries, and participants and contravene the intent of Congress—in return only for providing a luxury to the already well-protected participants—ASPA urges this Court to grant the Petition for a Writ of Certiorari in order to review and overturn the flawed decision of the Ninth Circuit.

Argument

A. The Decision Below Ignores Congressional Intent in Order to Provide the Privilege of a Virtually Limitless Statute of Limitations Period to Already Well-Protected Plan Participants Who, by Virtue of Stringent ERISA Disclosure Laws and Generous ERISA Statute of Limitations Provisions, Already Have the Ability to Adequately Safeguard Their Rights Under the Plan.

We believe the conflict presented in this case should be resolved by this Court favorably to the Petitioners, for the alternative is effectively to provide the already well-protected Respondent, and other plan partici-

pants affected by the Ninth Circuit decision, with an added and unnecessary benefit which runs directly contrary to Congressional intent.

Before ERISA was enacted, a participant often received no information regarding the plan, or was given information which was incomprehensible to him due to the technicalities and complexities of the language used.[3] Therefore, a participant might have had no awareness of the effect of a plan decision upon his or her benefits until several years after the decision was made. Since the impact of a trustee's decision could lie buried for years before it emerged to the detriment of a participant, it might well have been inequitable to confine the participant to a limited number of years following the decision in which to challenge it.

However, under ERISA, plan administrators and trustees now face extensive reporting and disclosure requirements.[4] Detailed information regarding plan fiduciaries, plan provisions, claims procedures, and participants' remedies must be distributed to participants and beneficiaries in the form of a summary plan description (the "SPD"). The SPD must be set out "in a manner calculated to be understood by the average plan participant, and . . . [must be] sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and ob-

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[3] S.Rep. No. 127, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4847; H.R. Rep. No. 533, 93d Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4646.

[4] 29 U.S.C. §§ 1021-1027, 1059.

ligations under the plan."[5] Any material modifications in the terms of the plan or changes in the SPD must also be distributed in the same way.[6] In addition, participants and beneficiaries must receive copies of certain statements submitted as schedules to the plan's annual report.[7] Furthermore, a participant is entitled to request and receive from the plan administrator a statement of the participant's accrued benefits and nonforfeitable benefits.[8] Finally, a participant may also be protected from confusion regarding an administrator's statements about the plan; a sponsor or administrator may be bound by his other statements regarding the plan which are contrary to the plan provisions.[9]

In addition to the information required to be distributed to participants and beneficiaries, ERISA also demands the filing of additional information with the

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[5] 29 U.S.C. § 1022.

[6] *Id.*

[7] 29 U.S.C. §§ 1021(a)(2), 1024(b)(3), 1023(b)(3)(A), (B).

[8] 29 U.S.C. § 1025.

[9] The terms "employee pension benefit plan" and "pension plan" are defined as a plan, fund, or program established or maintained by an employer or by an employee organization, or both, which by its express terms "*or as a result of surrounding circumstances*" meets the requirements set forth in the definition. 29 U.S.C. §1002(2) (emphasis supplied). *See Ogden v. Michigan Bell Telephone Co.*, 595 F.Supp. 961, 970 (E.D. Mich. 1984) (Section 1002(2) suggests that there may be circumstances in which employer representations and employee expectations define the terms of the benefit plan beyond the language in the document creating the plan).

appropriate federal agencies and the retention of records.[10]

With all of the extensive disclosure and reporting requirements established by ERISA, the potential for a participant to be unaware for several years of a plan decision or its detrimental ramifications upon his or her benefits is highly unlikely. The participant is given ample opportunity to police his or her own rights effectively.[11]

But even with such full disclosure, ERISA does not require the participants to rush to court. Rather, the statute's expansive statute of limitations provides ample time for an aggrieved participant to bring an action to protect his or her rights.[12] Indeed, the drafters' understanding of the complexity of pension issues led them to provide a bi-level statute of limitations. The statute permits an action with respect to a fiduciary's breach of duty to be commenced at any time up to

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[10] 29 U.S.C. §§ 1023, 1059.

[11] S.Rep. No. 127, 93d Cong., 2d Sess. 27, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4863 (intent to ensure that "participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.").

[12] In fact, this time period greatly exceeds the time periods allowed for the commencement of suits under other employment-related statutes. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (Title VII employment discrimination suits—must file civil action within ninety days from receipt of formal right-to-sue letter from EEOC); 29 U.S.C. § 255(a) (Fair Labor Standards Act and Equal Pay Act—complaint must be filed within two years of alleged violation); 29 U.S.C. § 626(e) (Age Discrimination in Employment Act—same time period as applicable to Fair Labor Standards Act).

the earlier of

(1) six years after . . . the date of the last action which constituted a part of the breach or violation, or . . .

(2) three years after the earliest date . . . on which the plaintiff had actual knowledge of the breach or violation. . . .

29 U.S.C. § 1113. The language of the statute makes clear that there is an obligation on the part of the informed participant to police the administration of his or her plan; Congress clearly intended that the participant have a substantial period of time in which to bring an action, but by no means was this time period intended to be unlimited.

By interpreting ERISA to start the limitations clock each time a fixed benefit check was received, the Ninth Circuit effectively nullified the intent of Congress to establish a fixed, albeit generous, statute of limitations. Since ERISA already provided for ample disclosure to participants and ample time for such participants to commence suit, participants' ability to police the plan has already been adequately safeguarded. The interpretation of the court below provides no benefit other than a mere luxury to the Respondent which Congress did not intend to bestow.

B. The Decision Below Threatens to Penalize Plan Sponsors, Administrators and Fiduciaries and Ultimately Jeopardize All Participants' Benefits, and Thus Undercuts the Intent of Congress to Secure Retirement Benefits and Encourage the Maintenance and Growth of the Employee Benefit System.

This Court has noted that, in enacting ERISA, Congress clearly desired to ensure that "if a worker has

been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). As part of the desire to protect a worker's anticipated benefits, Congress sought to prevent the termination of pension plans before sufficient funds have been accumulated in the plans. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713 (1984).

Congress was also aware that employers would not create, maintain, or enhance pension plans if ERISA proved too restrictive or costly. Therefore, in order to protect present benefits and to encourage the creation of new benefits, Congress also intended that the requirements it imposed by enacting ERISA be uniform, reasonable, and non-oppressive.[13]

The ramifications of the decision below could seriously undermine all of the salutary public policy concerns mentioned above, both for the Petitioners and for all sponsors, administrators, and fiduciaries of plans which may be challenged under the theory espoused by the Ninth Circuit. By effectively ruling that any decision by a plan sponsor, trustee, or adminis-

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[13] H.R. Rep. No. 533, 93d Cong., 2d Sess. 1,2,9, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640, 4647; 120 Cong. Rec. 29198 (1974) (Statement of Rep. Ullman); *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 880, 105 S.Ct. 245 (1984); *Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 572 F.Supp. 943, 949 (E.D. Mich. 1983), *rev'd on other grounds*, 767 F.2d 308 (6th Cir. 1985); *cert. denied*, 474 U.S. 1059, 106 S.Ct. 801 (1986).

trator that arguably affects a participant's benefit is forever subject to judicial challenge, the Ninth Circuit has destroyed the finality essential to the provision of promised benefits.

This Court is aware that determining the amount of contributions that must be made to ensure sufficient funding of a plan is a complex and difficult procedure.[14] Risks which are foreseeable may be built into the formula to ensure benefit security; however, the occurrence of unforeseeable contingencies can render ineffective even the most painstakingly prepared formula. Amounts carefully determined and set aside to cover contingencies prior to the Ninth Circuit's ruling now may prove to be painfully inadequate, and the amount of reserves required in the future for contingent liabilities may be impossible to fix. As this Court has noted, such unforeseen contingencies may jeopardize the solvency of the plan and, thus, the participants' benefits:

> The harm would fall in large part on innocent third parties. If . . . the [contingency is] recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated re-

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[14] *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721, 98 S.Ct. 1370, 1382 (1978).

duction in the contributions of past employees.[15]

Thus, an inadequate reserve could result in a current retiree's anticipated benefits being reduced or eliminated by the outcomes Congress intended to prevent—the underfunding of a plan, or even the termination of a plan, due to insufficient assets.

Active employees, in addition to suffering these same risks, may also find that Congress' intent to encourage the future growth of the pension system has also been undermined, and that they have been victimized as a result. Based on the Ninth Circuit's decision, employers who may have contemplated establishing additional or expanded benefits may now completely reject or drastically scale down such new benefits, because of either their limitless exposure under current plans or their potential exposure with respect to the new benefits. Under the Ninth Circuit's ruling, a beneficiary far into the future—having just received his or her 120th monthly pension check, for example—may decide to bring an action challenging the action of the trustees a decade earlier. And even if the challenge is eventually defeated, plan assets will have been squandered in judicial proceedings devoted to the resurrection of actions taken in the dim past.

The threat of never-ending exposure to judicial challenge may disrupt the responsible decision-making required of trustees, perhaps encouraging them to be

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[15] *Id.* at 722-723, 98 S.Ct., at 1382-1383; *see also Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1109-1110, 103 S.Ct. 3492, 3512-3513 (1983) (O'Connor, S., concurring).

overly conservative to the detriment of the plan's participants and beneficiaries. Also, reputable trustees may understandably consider it worthwhile to remain trustees only upon the assurance of significantly increased fees or expensive insurance coverage which would greatly and unnecessarily increase administrative costs to the plan. In the alternative, uncertainty may cause reputable trustees to get out of the business altogether, leaving those sufficiently disreputable as to be unconcerned about administering the plan in accordance with ERISA. In any of these scenarios, it is clear that current and future plan participants may be harmed by the practical consequences of the Ninth Circuit's ruling.

The decision's primary impact will, of course, be upon those private pensions plans which may be challenged in the Ninth Circuit and their participants, sponsors, administrators, and fiduciaries. This is but little comfort, for a staggering number of retirees and active employees may be affected by the decision. For example, over four million individuals of retirement age reside in the Ninth Circuit.[16] These individuals represent over ten percent of the entire population in the Ninth Circuit.[17] In addition, the Ninth Circuit includes the four states with the largest percentage increases in individuals of retirement age in the last decade.[18] These figures indicate that millions of retirees reside in the Ninth Circuit, and their numbers are growing faster than in any other location in the

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[16] American Association of Retired Persons, A Profile of Older Americans 1988, p.8.

[17] *Id.*

[18] Alaska, Arizona, Hawaii, and Nevada. *Id.*

United States. Those retirees residing in the Ninth Circuit who rely in any respect upon a private pension will be directly affected by the Ninth Circuit's ruling. Although the individuals affected may be considered to have received a benefit in the form of a limitless period to file suit, such benefit is illusory; in exchange for granting these retirees a limitless time period in which to sue, the Ninth Circuit is taking away the certainty that plan funds will actually exist to meet their economic expectations for retirement.

Nor is the decision below necessarily limited to those currently residing in the Ninth Circuit. Retirees and active employees living outside the Ninth Circuit whose employers have business ties to the Ninth Circuit may also be affected. Because of the requirement for uniform administration of pension plans, the impact of the decision below will spread nationwide due to the overriding demographic and geographic influence the Ninth Circuit has on our pension system.[19]

C. The Decision Below Could Undermine Congressional Intent by Causing the Social Security System to Be the Primary Source of Retirement Income for Millions of Americans Who Otherwise Would Have Been Supported Primarily by Private Pensions.

In addition to the detriment to the sponsors, administrators, fiduciaries, participants, and employees

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[19] Given the multitude of corporations which have offices in several locations within the United States, and the likelihood that many of such corporations have pension plans covering participants in all offices, the number of people residing outside the Ninth Circuit who may be directly affected by its ruling is likely to be quite substantial. As Congress has noted, "the operations of employee benefit plans are increasingly interstate." S.Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865.

mentioned above, the opinion below could undermine Congress' intent regarding the Social Security system. "The metaphorical 'three-legged stool' of retirement income consist[s] of social security, employer-provided pensions, and individual savings. . . ."[20] It is only logical that if one leg is weakened, shortened, or removed, more reliance must be placed upon the remaining two legs. Those individuals whose anticipated employer-provided pensions are reduced or eliminated by the Ninth Circuit ruling may now have to rely more upon their Social Security benefits to provide their income at retirement. The decision below, then, could cause the Social Security system to become something which Congress clearly did not intend it to be—the primary source of retirement income for the majority of Americans. This direct conflict with yet another intent of Congress is one more reason why the decision of the Ninth Circuit is clearly a step in the wrong direction.

Conclusion

The decision below could gravely hobble the ability of employers to provide economic security to employees in their aging years. Those employers who could afford to do so could find it exceedingly difficult to find a reputable trustee with whom to work, for few would be willing to assume the unlimited trustee liability which the lower court's ruling would create. The decision below thus undermines Congress' clear intent to provide retirement income security to employees through private pensions. It also undercuts Congressional intent by creating the potential for the

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[20] Borzi, *A National Retirement Income Policy: Problems and Policy Options*, 19 U. Mich. J. L. Ref. 5,8 (Fall 1985).

Social Security system to become the primary source of retirement income for a majority of Americans. For all of the foregoing reasons, this Court should grant Petitioners request for a Writ of Certiorari and the judgment of the Ninth Circuit should be reviewed and reversed.

Respectfully submitted,

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